(14)

No. 95-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,
Petitioner,

v.

UNITED STATES *ex rel.* WILLIAM J. SCHUMER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America is the nation's largest federation of business organizations and individuals, representing approximately 215,000 companies, many of which provide goods and services to the United States under government contracts. The Electronic Industries Association is a national organization of more than 1200 companies involved in the development and production of televisions, radios, computers, telecommun-

ications devices, radars, avionics, and other military and commercial electronic equipment. The National Security Industrial Association is a national organization of approximately 300 manufacturing, research, and service companies from all segments of industry that provide goods and services in support of the national security needs of the United States. The Shipbuilders Council of America is a trade association that promotes a sound private shipbuilding and ship-repair industry in the United States.

Amici's members annually perform billions of dollars of work for government agencies pursuant to thousands of contracts. This work exposes amici's members to the possibility of suits initiated by private individuals pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733. Accordingly, amici have a strong interest in the questions presented in this case. In the interest of brevity, amici address only some of the questions presented, relying entirely on petitioner's and other amici's discussion of other questions.

Both petitioner and respondent have consented to the filing of this brief, and letters reflecting these consents have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

A. The history of the civil False Claims Act demonstrates that liability is imposed only upon conduct that may cause the government financial injury. The Act was enacted in 1863 to stop the "plundering of the public treasury" and "was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). This Court consistently has regarded the Act as directed at false claims for federal money or property. *Id.*; *United States v. Cohn*, 270 U.S. 339, 345-46 (1926). As the Court determined in *United States v.*

Neifert-White Company, 390 U.S. 228, 233 (1968), the Act reaches "all fraudulent attempts to cause the Government to pay out sums of money."

In 1986, when Congress revised the civil False Claims Act for virtually the first time since its enactment, Congress specifically defined "claim" as meaning a "request or demand . . . for money or property." 31 U.S.C. § 3729(c). This definition confirmed the Court's interpretation that the Act was directed at financial injury to the government. Congress "strongly endors[ed]" the Court's holding that the Act "'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" S. Rep. No. 345, 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284 (quoting *Neifert-White*, 390 U.S. at 232).

That the Act imposes no civil liability for non-financial frauds is forcefully shown by Congress's extension of the *false statements* provision in the criminal False Claims Act to reach non-financial frauds. By this extension, Congress "sever[ed] the historical link with the false claims portion of the statute" and left untouched the civil and criminal provisions related to financial fraud. *Hubbard v. United States*, 115 S. Ct. 1754, 1760 (1995).

In this case, there was no false claim for money or property. All that occurred was that Hughes failed to file a timely Cost Accounting Standards Disclosure Statement as required by its contract and the applicable regulations. This run-of-the-mill violation was not associated with any claim for payment. Moreover, it did not threaten or cause financial harm to the government. To the contrary, the untimely disclosed accounting practice saved the government money. The Ninth Circuit nonetheless ruled that the nondisclosure could result in a false claim within the meaning of the False

Claims Act. *See* Pet. App. 25a. This unnatural interpretation, imposing severe penalties for run-of-the-mill violations that cause the government no harm, is contrary to the plain language of the Act, its legislative history, and this Court's decisions.

B. The "public disclosure" provision, 31 U.S.C. § 3730(e)(4)(A), which was instituted in the 1986 amendments, cannot be applied retrospectively, since it "permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available." *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296, 302 (1913). Although this provision is couched in jurisdictional terms, its effect on the substantive rights of defendants warrants application of the "default rule" that statutes not be given retroactive application. *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 1501 (1994).

C. The "public disclosure" provision bars qui tam actions that are "based upon the public disclosure of allegations" in an "administrative . . . audit." 31 U.S.C. § 3730(e)(4)(A). In this case, the government disclosed the alleged frauds in the course of an administrative audit to innocent Hughes employees, as well as to employees of another company, before the qui tam action was filed. Although the statute does not define the term "public disclosure," that term surely encompasses disclosures, like those made in this case, to persons who were strangers to the alleged frauds. The Court should reject the baseless ruling of the Ninth Circuit that disclosures to employees of defense contractors are "private" rather than "public" in nature.

ARGUMENT

I. THREATENED OR ACTUAL FINANCIAL HARM TO THE GOVERNMENT IS AN ESSENTIAL ELEMENT OF A FALSE CLAIM UNDER THE FALSE CLAIMS ACT.

A. Since its Inception, the False Claims Act Has Operated to Prevent Injury to the Federal Treasury.

Congress enacted the False Claims Act in 1863 "after disclosure of widespread fraud against the Government during the War Between the States." *Rainwater v. United States*, 356 U.S. 590, 592 (1958). "Testimony before Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *United States v. McNinch*, 356 U.S. 595, 599 (1958). To "stop this plundering of the public treasury," *id.*, and to "protect the funds and property of the Government from fraudulent claims," *Rainwater*, 356 U.S. at 592, Congress made it a criminal and civil offense for any person to "present or cause to be presented for payment or approval . . . any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent." Act of March 2, 1863, ch. 67, § 1, 12 Stat. 696. The 1863 Act also proscribed ancillary means of putting the government's money at risk. Thus, in what is known as the false statements provision, the Act prohibited the use of any "false or fraudulent statement or entry" in securing "the approval or payment of such claim." *Id.*, 12 Stat. at 696-97.

Congress made only "minor" changes to the Act in the following years. *Hubbard v. United States*, 115 S. Ct. 1754,

1760 n.8 (1995). When Congress rearranged the existing body of statutes by subject matter in 1873, it separated the 1863 Act containing both criminal and civil provisions into two separate sections of the Revised Statutes. Section 5438 contained the criminal sanctions, and Section 3490 contained the civil penalties. *See* Revised Statutes, 18 Stat. 5438, 3490. The civil section did not list the prohibited acts. It simply provided for double damages and a $2000 forfeiture for "any of the acts prohibited by any of the provisions of section [5438]" of the Revised Statutes. These provisions formed the official text of the civil False Claims Act until Congress enacted Title 31 of the U.S. Code as positive law and repealed section 3490 in 1982. Act of Sept. 13, 1982, chs. 1 & 37, §§ 3729-3731, 96 Stat. 877, 978-79; *see United States v. Bornstein*, 423 U.S. 303, 305 n.1 (1976).

B. This Court's Rulings Have Consistently Affirmed That the False Claims Act Imposes Liability Only Upon Conduct That Poses a Threat to Federal Funds.

The Court determined in *United States v. Cohn*, 270 U.S. 339 (1926), the kinds of claims that can give rise to False Claims Act liability. Although *Cohn* arose under the criminal provisions of the False Claims Act, it constitutes an essential building block in the construction of "claim" in the civil False Claims Act because the words construed in *Cohn* – "claim upon or against" the government – came directly from Revised Statute § 5438, which by cross-reference also described the conduct that gave rise to civil liability until the 1982 amendment. *See McNinch*, 356 U.S. at 600 n.10.

In *Cohn*, the Court defined "claim" to require a threat to the government's money or property, based on the government's own liability to the claimant, and it explicitly left outside the statute conduct that did not pose any threat of

injury to federal money or property, even if the purported claimant lied to the government. 270 U.S. at 345-46. Cohn was indicted for wrongfully gaining possession of merchandise held in customs. Because the Government laid no claim to the merchandise, Cohn's false statements could not "bilk the Government out of money or property." *Hubbard*, 115 S. Ct. at 1760. The Court determined that the requirement of a

> 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based on the Government's own liability to the claimant.

Cohn, 270 U.S. at 345-46. Similarly, the use of the word "defraud" throughout the statute referred to "the wrongful obtaining of money and other property of the Government." *Id.* at 347. Accordingly, the Court concluded that Cohn did not fall within the reach of the statute.

In *McNinch*, the Court reiterated that "'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.'" 356 U.S. at 599 (quoting *United States v. Tieger*, 234 F.2d 589, 591 (3d Cir. 1956)). Three individuals made false statements to a private bank to secure a federally-insured loan. After reviewing the language and history of the Act, the Court determined that such conduct fell outside of the civil statute. The statute was intended to crack down on "plundering of the public treasury" and "was not designed to reach every kind of fraud practiced on the Government." *Id.* Accordingly, the false loan application in *McNinch* did not constitute a false "claim" under the statute.

In *United States v. Neifert-White Company*, 390 U.S. 228, 233 (1968), the Court restated the definition of "claim"

for purposes of the civil statute to cover all instances of fraud intended to cause the government to pay out money. There, a grain storage bin vendor supplied false information in support of a loan application to the Commodity Credit Corporation (the "CCC"). Specifically, the company over-stated the purchase price of grain storage bins to induce the CCC to extend larger loans to the company's customers than the CCC's rules otherwise would have allowed. The company argued that it fell outside the *Cohn* definition of "claim" because it had not submitted a claim for payment based on the government's liability to the company. The Court rejected this argument. It revisited the legislative history of the Act and concluded that "the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Id.* at 232. In accordance with this purpose, the Court ruled that the *Cohn* definition was too restrictive because the False Claims Act reaches "beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233. As such, the Court ruled that the company was subject to civil False Claims Act liability.

In sum, this Court in *Neifert-White* reconfirmed the *Cohn* definition of a "claim" as meaning a claim that might result in financial loss to the government, but it abandoned the dictum in *Cohn* that a "claim" must be based on the government's liability to the claimant. *Id.* at 231, 233. Accordingly, *Neifert-White* provides no support for the Ninth Circuit's ruling that the False Claims Act extends to all contract violations regardless of their financial effect on the government. Since *Neifert-White*, the Court has again reaffirmed that the plain meaning of claim "connotes a demand for money or for some transfer of public property." *Bornstein*, 423 U.S. at 309 n.4.

The Court's decision in *Rex Trailer Company v. United States*, 350 U.S. 148 (1956), provides no support for the Ninth Circuit's decision. *Rex Trailer* involved fraudulent purchases from the government under the Surplus Property Act, a statute that provided the government with liquidated damages or double damages as alternative remedies for such frauds. The Court upheld the imposition of liquidated damages, stating that it was "obvious that injury to the Government resulted from the . . . fraudulent purchase." *Id.* at 153. The Court unremarkably held that it was not necessary for the government to allege or prove actual damages, which were "difficult or impossible to ascertain," in order to recover liquidated damages. *Id.* at 152-53. The *Rex Trailer* Court regarded injury as a necessary predicate to liability under the Surplus Property Act, just as it has always regarded financial injury as a predicate to liability under the civil False Claims Act.

C. In 1986, Congress Amended the False Claims Act to Define "Claim" as "Any Request or Demand" for "Money or Property."

In 1986, Congress amended the civil False Claims Act to insert a statutory definition of "claim" that comprehends "any request or demand" for the payment of federal "money or property," even if submitted to "a contractor, grantee, or other recipient" of federal funds. 31 U.S.C. § 3729(c).[1] This definition reaffirmed that a false claim under the Act

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[1] The 1986 amendments constituted the first substantive changes to the civil False Claims statute since its inception. In 1982, when Congress enacted Title 31 of the U.S. Code as positive law, including the civil False Claims Act, it substituted "simple language" for "awkward and obsolete terms" and changed language "to attain uniformity," but it made "no substantive change in the law." H.R. Rep. No. 651, 97th Cong., 2d Sess. 1, 2-3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1896-97.

involves a request or demand for the payment of money. It also broadened the definition of claim to make clear that "frauds perpetrated on Federal grantees, including States and other recipients of Federal funds," were actionable under the False Claims Act, even though the fraudulent claim was not presented directly to the Government. S. Rep. No. 345, 99th Cong., 2d Sess. 21 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5286.

In a second change, Congress further emphasized the focus of the Act on financial injury by inserting a provision to ensure that "reverse false claims," in which the claimant avoids or decreases the amount of money rightfully payable to the government, fall within the scope of the False Claims Act. 31 U.S.C. § 3729(a)(7). Before 1986, courts were divided on whether such claims fell within the ambit of the Act. Congress's action in 1986 recognized that "the effect of fraud on the government is pretty much the same whether too much is extracted from the federal treasury or too little paid in." *United States v. American Heart Research Foundation, Inc.*, 996 F.2d 7, 10 (1st Cir. 1993).

Both of these changes expand the class of "claims" that are subject to the False Claims Act, but they retain the focus of the statute on conduct or omissions that may cost the government money. Congress recognized that reverse false claims and fraud perpetrated on a federal grantee may create a "'financial loss to the Government,'" and accordingly it "strongly endorse[d]" this Court's statements in *Neifert-White*. S. Rep. No. 345 at 19, *reprinted in* 1986 U.S.C.C.A.N. 5284 (quoting *Neifert-White*, 390 U.S. at 232).

D. The History of the Criminal False Claims Act and Criminal False Statements Act Shows That the Civil False Claims Act Reaches Only Financial Frauds.

The New Deal programs of the 1930s presented a new opportunity for fraud against the government: non-financial fraud aimed at manipulating government regulatory programs even if no money or property was sought from the government. *See United States v. Yermian*, 468 U.S. 63, 72 (1984). In particular, the government had been receiving false certifications regarding the amount of oil produced and sold in interstate commerce in violation of a regulatory program designed to stabilize the oil industry. *See United States v. Gilliland*, 312 U.S. 86, 90 (1941). Accordingly, Secretary of Interior Harold L. Ickes advocated a change in the criminal False Claims Act to correct the absence of a "law . . . under which prosecutions may be secured for the presentation of false papers" that interfered with government programs but did not cause financial injury to the government. H.R. Rep. No. 829, 73d Cong., 2d Sess. 2 (1934).

Congress extended the *false statements* provision of the criminal False Claims Act in response to Secretary Ickes' requests. It provided that any falsity, concealment, or cover-up of a material fact in a "false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" would expose the maker to liability under the *false statements* provision of the criminal False Claims Act. Act of June 18, 1934, ch. 587, § 35, 48 Stat. 996. This language altered the "fundamental character" of that provision in the statute. *Hubbard*, 115 S. Ct. at 1760. Congress deleted the statute's references to financial frauds from the false statements provision and thereby "sever[ed] the historical link with the false claims portion of the statute" that the false statements

provision had previously shared. *Id.* The amendment "broadened the provision so as to leave no adequate basis" for the conclusion that the false statements portion of the statute covered only financial fraud. *Gilliland*, 312 U.S. at 93. Indeed, the Court quickly approved the use of the new false statements provision in the criminal prosecution of non-financial false certifications in connection with the oil regulatory program. *Id.* at 95-96. The amendment reflected "congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from [non-financial] deceptive practices." *Id.* at 93.

This revision supports the conclusion that the provisions of the civil statute extend only to falsehoods that may cause financial injury to the federal treasury. Although Congress expanded the false statements provision of the criminal False Claims statute, it declined to change the civil False Claims statute. If Congress had believed that a civil remedy should exist for non-financial frauds, it would have amended the civil provisions as well as the criminal provisions. But as noted above, the civil provisions remained essentially unchanged from 1909 to 1982, and no amendment subsequent to 1982 indicates any change in this aspect of the civil False Claims statute. In addition, Congress made no change to the provision in the criminal False Claims statute prohibiting false claims (as opposed to false statements). Thus, the False Claims portion of the criminal statute retained the "claim upon or against" language that the Court in *Cohn* held to encompass only financial frauds in which the Government stood to lose money or property. *Cohn*, 270 U.S. at 345-47. The lack of any change in the language of the False Claims provision of the statute indicates a congressional intent to retain the "fundamental" concentration on "financial frauds" embodied by the False Claims

part of the statute. *Hubbard*, 115 S. Ct. at 1760. Indeed, the Court continues to rely on the *Cohn* definition of "claim" in interpreting the criminal provisions of the False Claims Act. *Yermian*, 468 U.S. at 70-71; *Hubbard*, 115 S. Ct. at 1759 n.5.

E. The Alleged Misconduct in This Case Did Not Cause Threatened or Actual Financial Injury to the Government and Cannot Support Civil False Claims Act Liability.

The history of the False Claims Act manifests the relentless pursuit of a single goal: protecting the federal Treasury from those who would defraud the government. Simply put, the Act requires that an actionable false "claim" pose a threat to federal money or property in some manner. The record in this case reveals no such threat. To the contrary, as the Ninth Circuit recognized, the untimely disclosed accounting system "actually saved the government money." Pet. App. 4a. This Court should reverse the erroneous ruling of the Ninth Circuit that a false "claim" can exist even when no federal money or property is at risk.

A run-of-the-mill contract violation that is not associated with any claim for payment, and therefore cannot have any impact on federal funds, cannot form the basis of a False Claims Act lawsuit. There are many regulations and standard Government contract requirements that do not bear on the provision of goods or services under the contract, and therefore are not associated with any claim for payment, such as the Cost Accounting Standards disclosure requirement at issue here. Run-of-the-mill violations of such provisions, for which the Government has a variety of routine remedies, cannot give rise to liability under the False Claims Act.

II. THE PUBLIC DISCLOSURE PROVISION IN THE 1986 AMENDMENTS TO THE FALSE CLAIMS ACT CANNOT BE APPLIED RETROACTIVELY BECAUSE IT ATTACHES NEW LEGAL CONSEQUENCES TO EVENTS COMPLETED BEFORE ITS ENACTMENT.

The event alleged to give rise to liability in this action, Hughes' failure to submit a timely Cost Accounting Standards Disclosure Statement, occurred before enactment of the 1986 amendments to the Act. Under this Court's decisions, the "public disclosure" provision of the 1986 amendments cannot be applied retrospectively to that event.

In *Winfree v. Northern Pacific Railway Company*, 227 U.S. 296, 302 (1913), the Court refused to permit retroactive application of a statute

> permit[ting] recovery, in cases where recovery could not be had before, and [taking] from the defendant defenses which formerly were available, defenses which . . . existed at the time when . . . the accident occurred.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 1505 (1994), the Court reaffirmed that a statute "impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed" cannot govern preenactment conduct. In other words, "prospectivity remains the appropriate default rule" where, as here, Congress has not addressed the temporal reach of a statute. *Id.* at 1501.

Because the "public disclosure" provision of the amendments changed the rights of both the qui tam relator and defendant, it should not be construed to apply retrospectively to preenactment conduct. Prior to 1986,

courts were required to dismiss suits that were "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982). In the 1986 amendments, Congress granted qui tam plaintiffs the right to maintain suits even if the government knew of the underlying information:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations . . . unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). In 1986, thus, Congress created a new qui tam cause of action that would have been barred under the prior law.

At the same time, Congress stripped defendants in qui tam cases of an absolute defense that "disproved the right of action." *Winfree*, 227 U.S. at 302. The pre-1986 statute permitted government contractors to disclose possible violations to the government so as to preclude qui tam actions. Instead of allowing disclosed information to function as a shield for the contractor, as it would under the law in effect at the time of a pre-1986 disclosure, such information now has become a weapon to be wielded against the contractor.

Notwithstanding the substantive changes wrought by the 1986 amendments on the rights of qui tam relators and defendants, the Ninth Circuit here disregarded *Winfree* and *Landgraf* and erroneously concluded that the public disclosure provision of the 1986 amendments should be applied retrospectively. Indeed, the Ninth Circuit effectively turned *Landgraf* on its head. The court culled a "strong presumption that jurisdictional statutes apply retrospectively" from *Landgraf*, Pet. App. 6a, even though *Landgraf* merely notes in dicta that "a new jurisdictional rule usually

'takes away no substantive right but simply changes the tribunal that is to hear the case'" and thus may be applied retrospectively. 114 S. Ct. at 1502 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Nothing in *Landgraf* suggests, however, that a statute affecting the parties' substantive rights can be applied retrospectively just because the statute contains the term "jurisdiction." The Ninth Circuit has elevated a meaningless exercise in labeling above a meaningful assessment of the substantive impact of the Act.

The Ninth Circuit eventually asked the proper question to rebut its presumption of retroactivity – whether "the jurisdictional rule curtailed a substantive right" – but it reached the wrong result. Pet App. 7a. Relying on *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996), the Ninth Circuit concluded that "the amendment does not infringe on the substantive rights of the defendant." Pet. App. 7a. In *Lindenthal*, the Ninth Circuit simply followed the mechanical approach of looking to the word "jurisdiction" in the statute and concluding that the new public disclosure provision did not alter the substantive rights of the parties because it was jurisdictional. 61 F.3d at 1408. This circular approach overemphasized the importance of the term "jurisdiction" in the public disclosure provision, a term that is "so popular that its chameleon quality sometimes slips from our grasp." *Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 n.4 (D.C. Cir. 1986) (R.B. Ginsburg, J., dissenting) (quoting *United States v. Kember*, 648 F.2d 1354, 1357 (D.C. Cir. 1980).

This fundamental error in its approach to the question of retroactivity led the Ninth Circuit to disparage the substantive effects of the public disclosure provision of the

1986 amendments. But that provision allows a qui tam plaintiff to recover in circumstances where it could not have recovered under prior law and eliminates absolute defenses previously available to a defendant. Whether or not the public disclosure provision is considered "jurisdictional," it cannot be applied retrospectively to alter the substantive rights of the parties.

III. A GOVERNMENT DISCLOSURE OF INFORMATION TO "INNOCENT" COMPANY EMPLOYEES DURING AN AUDIT OR INVESTIGATION CONSTITUTES A "PUBLIC DISCLOSURE" THAT BARS SUBSEQUENT QUI TAM ACTIONS.

Well before this lawsuit was filed, the government conducted an audit of the Hughes accounting practices at issue in the case. In the course of that audit, the government disclosed allegations of accounting impropriety to employees of Hughes and its prime contractor, Northrop, who were not involved in the alleged improprieties. *E.g.*, J.A. 113-15, 157-75. These disclosures constituted a "public disclosure of allegations" in an "administrative . . . audit" within the meaning of the public disclosure provision of the 1986 amendments to the Act, 31 U.S.C. § 3730(e)(4)(A), and this action accordingly should have been dismissed.

The public disclosure provision of the False Claims Act bars qui tam actions that are:

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The statutory text plainly provides that a disclosure of allegations of misconduct to members of the public in one of the ways specified in the statute is a public disclosure. Nothing in the statute suggests that a disclosure must be broadly disseminated to any particular number of individuals, or to any particular categories of individuals, in order to be deemed public. To the contrary, the sorts of public disclosures identified in the statute contemplate disparate degrees of dissemination to different groups of individuals. Broadcasts in the news media may be disseminated widely to the nation at large; Government Accounting Office reports will likely be read by only a few members of the public; disclosures made in the course of civil hearings will likely be disseminated to the litigants and perhaps other interested parties; and disclosures made in administrative audits and investigations will likely be made only to a few specific individuals, typically those subjected to audit or investigation. Under the statute, each of these disclosures ordinarily constitutes a public disclosure and cannot form the basis for a qui tam action, regardless of the number or identity of individuals who receive the information.

Amici do not suggest that all disclosures made in the ways specified in Section 3730(e)(4) will necessarily constitute "public disclosures." The disclosure must be of such a nature that it is "public." Thus, disclosures of allegations to persons who were involved in the alleged wrongdoing would not be "public." Disclosures of allegations made in grand jury proceedings or disclosures made in documents filed under seal in civil proceedings may not be "public." Disclosures of allegations made to government employees may not be "public." But disclosures by the government that reach members of the public who are strangers to the fraud and who are not government employees, or any disclosures in the news media, fall within any

reasonable construction of the term "public disclosure." *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992).

To escape the conclusion that the disclosures made to Hughes and Northrop employees in the course of an "administrative audit" were "public disclosures," the Ninth Circuit labeled the disclosures a "release of information within a private sphere." Pet. App. 10a. The court asserted that it was "unrealistic" to treat employees of government contractors as "members of the public," since these employees would have a "strong economic incentive" to protect disclosures of wrongdoing from further dissemination. *Id.* at 9a. This assertion is insupportable. Individuals who happen to be employees of defense contractors or subcontractors do not lose their status as members of the public by virtue of their employment.

Nor should the statutory rule be defeated by the unwarranted assumption that such employees will not disseminate the information that is disclosed to them. It is the Ninth Circuit that is "unrealistic" in surmising that employees of government contractors are unlikely to file qui tam suits based upon information relating to fraud. In considering the 1986 amendments Congress heard testimony from employees of defense contractors who had filed qui tam suits against their employers, and it understood that employees were a class of individuals likely to have knowledge of information relating to fraud. *See False Claims Reform Act, 1985: Hearing on S. 1562 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 80-85 (September 17, 1985); S. Rep. No. 345 at 13-14, *reprinted in* 1986 U.S.C.C.A.N. 5278-79; H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986). Indeed, Congress specifically tailored the 1986 amendments to the False Claims Act to encourage employees to file qui tam actions, by enacting

provisions that protect employees from subsequent retaliation. *See* 31 U.S.C. § 3730(h). Furthermore, as the reported qui tam cases attest, the most common qui tam plaintiffs have proven to be current and former employees of corporations, many of which are defense contractors. *See, e.g., United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993); *see generally* John T. Boese, *Civil False Claims and Qui Tam Actions* 4-9 through 4-11 (Supp. 1995).

The Ninth Circuit also looked to the legislative history of the statute for support, stating that a narrow reading of the "public disclosure" bar would further Congress's purpose of encouraging qui tam actions to prod the government into action. Pet. App. 10a-11a. Although this was one of Congress's goals, *see* S. Rep. No. 345 at 24-26, *reprinted in* 1986 U.S.C.C.A.N. 5289-91, H.R. Rep. No. 660 at 22-23, the principal goal of the 1986 amendments was to provide additional incentives for whistleblowers to bring new information to the government concerning fraud, while continuing to ban "parasitic" lawsuits based upon information already in the public domain. *See, e.g., Doe*, 960 F.2d at 321-22; *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991); *see also* S. Rep. No. 345 at 1-2, *reprinted in* 1986 U.S.C.C.A.N. 5266-67; H.R. Rep. No. 660 at 22-23. It would hardly further Congress's purpose if the statute were to allow qui tam actions based on information already disclosed in the course of a government audit or one of the other methods identified in the statute merely because the information had been disclosed only to a few members of the public or to a particular class of individuals.

The Ninth Circuit also objects that if a government disclosure to innocent company employees is interpreted as a public disclosure, then "government possession of information relating to fraud effectively forecloses qui tam suits." Pet. App. 10a. This is untrue. Only qui tam lawsuits that are "based upon" government disclosures in an investigation or audit are barred by the statute. And even if a qui tam lawsuit is based upon information disclosed in a government audit or investigation, qui tam plaintiffs who qualify as "original sources" of the information will remain able to prosecute their actions.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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